

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

GIL CROSTHWAITE and RUSS BURNS, in their
respective capacities as Trustees of the
OPERATING ENGINEERS' HEALTH AND
WELFARE TRUST FUND, PENSION TRUST
FUND FOR OPERATING ENGINEERS,
PENSIONED OPERATING ENGINEERS'
HEALTH AND WELFARE FUND, OPERATING
ENGINEERS AND PARTICIPATING
EMPLOYERS PRE-APPRENTICESHIP,
APPRENTICE AND JOURNEYMEN
AFFIRMATIVE ACTION TRAINING FUND,
HEAVY AND HIGHWAY COMMITTEE, and
OPERATING ENGINEERS LOCAL 3,

Plaintiffs,

v.

SANCHEZ GRADING, a California Corporation,
and LEO SANCHEZ, an Individual,

Defendants.

No. C 09-01386 WHA

**ORDER GRANTING
PLAINTIFFS'
MOTION FOR
DEFAULT JUDGMENT**

INTRODUCTION

In this action under the Employee Retirement Income Security Act, plaintiffs Gil Crosthwaite, Russ Burns, Operating Engineers' Health and Welfare Trust Fund, Pension Trust Fund for Operating Engineers, Pensioned Operating Engineers' Health and Welfare Fund, Operating Engineers and Participating Employers Pre-Apprenticeship, Apprentice and Journeymen Affirmative Action Training Fund, Heavy and Highway Committee, and Operating

1 Engineers Local 3 move for default judgment against defendants Sanchez Grading and Leo
2 Sanchez. For the following reasons, the motion is **GRANTED**.

3 **STATEMENT**

4 The facts alleged by plaintiffs are as follows. Plaintiffs Operating Engineers' Health
5 and Welfare Trust Fund, Pension Trust Fund for Operating Engineers, Pensioned Operating
6 Engineers' Health and Welfare Fund, Operating Engineers and Participating Employers
7 Pre-Apprenticeship, Apprentice and Journeymen Affirmative Action Training Fund, Heavy and
8 Highway Committee (hereinafter "plaintiff benefit plans") are employee-benefit plans as defined
9 in the Employee Retirement Income Security Act of 1974 ("ERISA"). Plaintiffs Crosthwaite and
10 Burns are co-chairman of the Joint Boards of Trustees of plaintiff benefit plans and are authorized
11 to act on behalf of all trustees. Operating Engineers Local 3 is a labor organization as defined in
12 the National Labor Relations Act.

13 On June 1, 2001, defendants Sanchez Grading and Leo Sanchez (the employer) executed a
14 written collective bargaining agreement with the union. This agreement incorporated the terms of
15 several other agreements and required signatory employers to do the following:

- 16 1. Make timely contributions into plaintiff benefit plans at a specified
17 rate per hour worked by, or paid to, all employees performing work covered by
18 the agreement;
- 19 2. Report the number of covered hours worked by, or paid to, each
20 employee covered by the agreement and the amounts owed for that work; and
- 21 3. Allow an audit of their books and records to allow plaintiff benefit
22 plans to determine whether the employer is making full and prompt payment of
23 the required contributions.

24 In accordance with this agreement, defendants submitted to an audit for the period of
25 January 2005 to December 2006. This audit showed that defendants owed \$6,992.95 in unpaid
26 contributions. Due to this delinquency, plaintiff benefit plans assessed \$2,080.14 in liquidated
27 damages, \$3,433.70 in interest, and \$1,199.51 in audit costs, pursuant to the agreement.
28 A subsequent audit showed that defendants owed \$2,717.44 in unpaid contributions in August

1 and September 2008. Plaintiff benefit plans assessed \$704.28 in liquidated damages and \$588.38
2 in interest for these delinquencies. The agreement also provided for the recovery of attorney's
3 fees and costs in an action to recover unpaid contributions and enforce the terms of the
4 agreement. Plaintiff benefit plans accrued \$6,550.50 in attorney's fees and \$470.67 in costs.

5 On March 30, 2009, plaintiffs commenced the instant action. On June 2, plaintiffs filed
6 an amended complaint and served defendants via personal service on June 4. Proof of service
7 was filed on June 22. Defendant failed to answer. At the request of plaintiffs, the clerk entered
8 default against defendants on June 30.

9 Plaintiffs now move for default judgment against defendants (Dkt. No. 24) and request a
10 judgment granting plaintiffs the following relief:

- 11 1. \$9,710.39 in unpaid contributions;
- 12 2. \$2,784.42 in liquidated damages;
- 13 3. \$4,022.08 in interest;
- 14 4. \$1,199.51 in audit costs;
- 15 5. \$6,550.50 in attorney's fees; and
- 16 6. \$470.67 in costs.

17 ANALYSIS

18 Under FRCP 55(b)(2), a party can apply to the court for entry of judgment by default.
19 "The district court's decision whether to enter a default judgment is a discretionary one."
20 *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). In determining whether default judgment
21 is appropriate, the following factors are considered:

- 22 (1) [T]he possibility of prejudice to plaintiff, (2) the merits of
- 23 plaintiff's substantive claim, (3) the sufficiency of the complaint,
- 24 (4) the sum of money at stake in the action, (5) the possibility of a
- 25 dispute concerning the material facts, (6) whether the default was
- 26 due to excusable neglect, and (7) the strong policy underlying the
- 27 Federal Rules of Civil Procedure favoring decisions on the merits.

28 *Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir. 1986). For the following reasons, these
factors favor granting default judgment.

1 **1. MERITS OF SUBSTANTIVE CLAIMS AND**
2 **SUFFICIENCY OF THE COMPLAINT.**

3 After the entry of default, all well-pleaded factual allegations in the complaint are taken
4 as true, except as to the amounts of damages. *Fair Housing of Marin v. Combs*, 285 F.3d 899,
5 906 (9th Cir. 2002). The merits of plaintiff's substantive claims and the sufficiency of the
6 complaint are thus considered together.

7 The terms of the collective bargaining agreement are controlling. With regards to
8 delinquent payments, ERISA states:

9 Every employer who is obligated to make contributions to a
10 multiemployer plan under the terms of the plan or under the terms
11 of a collectively bargained agreement shall, to the extent not
12 inconsistent with law, make such contributions in accordance with
13 the terms and conditions of such plan or such agreement.

14 29 U.S.C. 1145. The Ninth Circuit has read Section 1145 as creating a federal cause of action
15 against employers who do not make timely contributions as required under a collective
16 bargaining agreement, such as the one involved in this action. *See, e.g., Trustees of the Screen*
17 *Actors Guild-Producers Pension & Health Plans v. NYCA, Inc.*, 572 F.3d 771, 776–77 (9th Cir.
18 2009). Moreover, when damages are “certain,” as in this case where covered work has been
19 performed and the only question is the amount of contribution due, the burden is on the employer
20 to prove that the plaintiff's damage estimate is incorrect. *Motion Picture Industry Pension &*
21 *Health Plans v. N.T. Audio Visual Supply, Inc.*, 259 F.3d 1063, 1065–67 (9th Cir. 2001).
22 In other words, the determination regarding the amount due is to be construed in favor of the
23 benefit plans.

24 As explained, contributions that defendants owed under Section 1145 are delinquent.
25 The damages that are to be recovered by the benefit plans in such an action are set forth in
26 29 U.S.C. 1132(g)(2):

27 In any action under this subchapter by a fiduciary for or on behalf
28 of a plan to enforce section 1145 of this title in which a judgment
29 in favor of the plan is awarded, the court shall award the plan —

- 30 (A) the unpaid contributions,
- 31 (B) interest on the unpaid contributions,
- 32 (C) an amount equal to the greater of —

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorneys fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

The Ninth Circuit has interpreted Section 1132(g)(2) to mean that, when an employer is found liable for delinquent contributions, an award of the unpaid contributions, interest, liquidated damages, and reasonable attorney's fees and costs is mandatory. *See Northwest Adm'rs, Inc., v. Albertson's, Inc.*, 104 F.3d 253, 257–58 (9th Cir. 1996); *Teamsters Pension Trust Fund-Board of Trustees of the Western Conference v. Allyn Transp. Co.*, 832 F.2d 502, 507 (9th Cir. 1987).

In short, plaintiffs' complaint sufficiently states a meritorious cause of action for breach of fiduciary duty under ERISA.

2. REMAINDER OF THE *EITEL* FACTORS.

The remainder of the *Eitel* factors favor entering default judgment in favor of plaintiffs. If this motion is not granted, plaintiffs will be left without a remedy or a means to prevent defendants' continued delinquency. Defendants never answered or otherwise responded to the complaint, so it is unclear whether there would be any dispute over material facts. There is no evidence that defendants' failure to respond was the result of excusable neglect.

It is true that a large sum of money at stake would disfavor default judgment. *See Eitel*, 782 F.2d at 1472 (stating that a three million dollar judgment at stake, considered in light of the parties' dispute as to material facts, supported the court's decision not to enter default judgment). At present, plaintiffs request a default judgment against defendants in the amount of \$24,737.57.

1 The requested amount is reasonable considering the liquidated damages and interest mandated
2 by Section 1132(g)(2).

3 Finally, although federal policy does favor a decision on the merits, Rule 55(b) allows
4 entry of default judgment in situations such as this, where the defendant has refused to litigate.
5 On balance, the *Eitel* factors weigh in favor of granting default judgment.

6 **3. DETERMINATION OF RELIEF.**

7 Plaintiff seeks a judgment granting the following relief: (1) \$9,710.39 in unpaid
8 contributions; (2) 2,784.42 in liquidated damages; (3) \$4,022.08 in interest; (4) \$1,199.51 in
9 audit costs; (5) \$6,550.50 in attorney's fees; and (6) \$470.67 in costs.

10 **A. Unpaid Contributions.**

11 As stated above, the Ninth Circuit has held that when an employer is found liable for
12 delinquent contributions, an award of the unpaid contributions, interest, liquidated damages,
13 and reasonable attorney's fees and costs is mandatory, pursuant to Section 1132(g)(2).
14 *Northwest Adm'rs*, 104 F.3d at 257–58; *Teamsters Pension Trust Fund*, 832 F.2d at 507.
15 The audit performed revealed that defendants owed \$6,992.95 in unpaid contributions in
16 January 2005 to December 2006 . A subsequent audit revealed that defendants owed \$2,717.44
17 in unpaid contributions in August and September 2008. Therefore, plaintiffs' request for
18 \$9,710.39 in unpaid contributions is hereby **GRANTED**.

19 **B. Liquidated Damages and Interest.**

20 Section 1132(g)(2) provides that liquidated damages and interest are recoverable.
21 *First*, liquidated damages may not exceed "20 percent (or such higher percentage as may be
22 permitted under Federal or State law)" of unpaid contributions. 29 U.S.C. 1132(g)(2)(C)(ii).
23 The collective bargaining agreement provided a rate of 15 percent for liquidated damages
24 (McBride Decl. Exh. C at 5). *Second*, interest on unpaid contributions must be calculated
25 "by using the rate provided under the plan, or, if none, the rate prescribed under section 6621
26 of Title 26." 29 U.S.C. 1132(g)(2). The collective bargaining agreement provided an interest
27 rate of 12 percent per annum (McBride Decl. Exh. C at 5).
28

1 Plaintiffs seek an award of liquidated damages in the amount of \$2,080.14 for
2 January 2005 to December 2006 and \$704.28 for August and September 2008 (Br. 3).
3 Plaintiffs also seek an award for interest in the amount of \$3,433.70 for January 2005 to
4 December 2006 and \$588.38 for August and September 2008 (*ibid.*). Plaintiffs, however,
5 do not specify how the liquidated damages or the interest were calculated — whether under
6 the collective bargaining agreement or some other formula. As a result, this order cannot tell
7 whether the requirements of Section 1132(g)(2) were complied with and therefore, cannot award
8 the requested damages at this time.

9 Accordingly, plaintiffs' request for liquidated damages in the amount of \$2,784.42 and
10 interest in the amount of \$4,022.08 is hereby **DENIED**. Plaintiffs may submit a proper
11 explanation of the requested amounts of liquidated damages and interest on the unpaid
12 contributions for January 2005 to December 2006 and August and September 2008 in
13 accordance with Section 1132(g)(2) by **NOON ON FRIDAY, MAY 14, 2010**. Following such a
14 submission, the Court will then determine whether the requested relief is appropriate.

15 **C. Audit Costs.**

16 The collective bargaining agreement provided that the employer shall pay for reasonable
17 audit costs (McBride Decl. Exh. C at 5). Plaintiffs seek \$1,199.51 in audit costs. Plaintiffs have
18 explained the audit costs incurred in this action and why such amounts are reasonable (Bradley
19 Decl. ¶ 5). Therefore, plaintiffs' request for \$1,199.51 in audit costs is hereby **GRANTED**.

20 **D. Attorney's Fees and Costs.**

21 Plaintiffs seek \$6,550.50 in attorney's fees and \$470.67 in costs. Defendant has failed
22 to appear in this case, and the requested amounts appear reasonable. Plaintiffs have also
23 explained the costs and fees incurred thus far in this action and why such amounts are reasonable
24 (Kaplan Decl. ¶ 10). Therefore, plaintiffs' request for \$6,550.50 in attorney's fees and \$470.67
25 in costs is hereby **GRANTED**.
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CONCLUSION

For the forgoing reasons, plaintiffs' motion for default judgment is hereby **GRANTED**. Defendant is hereby **ORDERED** to pay plaintiff \$9,710.39 in unpaid contributions, \$1,199.51 in audit costs, \$6,550.50 in attorney's fees, and \$470.67 in costs.

Plaintiffs' request for liquidated damages in the amount of \$2,784.42 and interest in the amount of \$4,022.08 is hereby **DENIED**. Plaintiffs may submit a proper explanation of the requested amounts of liquidated damages and interest on the unpaid contributions for January 2005 to December 2006 and August and September 2008 in accordance with Section 1132(g)(2) by **NOON ON FRIDAY, MAY 14, 2010**. Following such a submission, the Court will then determine whether the requested relief is appropriate.

IT IS SO ORDERED.

Dated: May 6, 2010.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE